81-2202

No. . . . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

WESTINGHOUSE ELECTRIC CORPORATION,
Defendant-Petitioner,

v.

GEORGE TRIBBLE,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

This case involves the interpretation and application of the Age Discrimination in Employment Act (the "ADEA"). It raises serious questions as to what constitutes proof of a violation of the ADEA, particularly in the context of a corporate reorganization entailing the elimination of jobs.

The questions presented are:

I. What is the proper allocation of burdens and order of presentation of proof in the trial of a case brought under the ADEA?

II. In light of the discrimination cases previously decided by this court, culminating in **Texas Department of Community Affairs** v. **Burdine,** did the Eighth Circuit err in holding that there was evidence of discrimination where the employer produced evidence of legitimate, nondiscriminatory reasons for its actions, and there was no direct evidence of discrimination and no evidence of pretext?

III. What are the proper standards to be applied in determining whether a plaintiff in a discrimination case makes out a submissible jury case where the defendant presents evidence of legitimate, nondiscriminatory reasons for its actions?

IV. Did the Eighth Circuit Court of Appeals err in holding, in conflict with decisions of other circuit courts of appeals, that a sixty-three-year-old employee who elected early retirement after his position was eliminated due to adverse economic conditions established a prima facie case of age discrimination?

RULE 28.1
LISTING OF ALL SUBSIDIARIES AND AFFILIATES OF WESTINGHOUSE ELECTRIC CORPORATION
(Excluding Wholly Owned Subsidiaries)

Ateliers de Constructions Electriques de Charleroi, S.A.
B. F. Sturtevant Canada Inc.
Bayou Cablevision, Inc.
Bridgeport Community Antenna Television Company
Cable TV General, Inc.
CATV Enterprises, Inc.
CDSW Ireland Limited
Cemac Westinghouse Pty. Ltd.
China Industry Services Co., Ltd.
CMW Equipamentos, Ltda.
CMW Sistemas, Ltda.
Compagnie des Dispositifs Semiconducteurs Westinghouse
El Paso Cablevision, Inc.
Electrics (1978) Inc.
Electrocontroles Villares, Ltda.
Electro - Fanal S.A.
Eletromar Industria Eletrica Brasileira, S.A.
Eletromar Nordeste, S.A.
Endurance Electric Pty. Limited
Ercole Marelli & Company, S.p.A.
Focus Cable of Oakland, Inc.
Funktionelle Musik GMBH
Galileo Argentina C.I.S.A.
Galileo Uruguaya, S.A.
Grosse Point Cable, Inc.
Home Theater Network, Inc.
IEM S.A.
Industria IEM, S.A. de C.V.
Industrias Electronicas, S.A.
Industry Services Company of Saudi Arabia, Ltd.

Kaiser-Teleprompter of Hawaii, Inc.
Living & Learning (Cambridge), Ltd.
Metzenauer & Jung BV
Metzenauer & Jung GmbH
Metzenauer & Jung Ltd.
Mex Control, S.A. de C.V.
Mitsubishi Nuclear Fuel Co., Ltd.
Moorebank Properties Pty. Limited
Motores Electricos de Juarez S.A. de C.V.
Norddeutsche Elektrotechnische Werke Metzenauer & Jung GmbH
Ottermill Products Limited
Piedmont Cablevision, Inc.
Saw Mill River Cablevision, Inc.
Schneider S.A.
Silectra, S.A. de C.V.
Societa Progettiazione Reattori Nucleari, S.p.A.
Southwest Video Corporation
Telcom Cablevision, Inc.
Teleprompter of Avon Lake, Inc.
Teleprompter of Columbia Heights/Hilltop, Inc.
Teleprompter of Denver, Inc.
Teleprompter of Erie, Inc.
Teleprompter of Kentucky, Inc.
Teleprompter of Lorain County, Inc.
Teleprompter of Milwaukee, Inc.
Teleprompter of Sacramento, Inc.
Teleprompter of St. Bernard, Inc.
Teleprompter of St. Paul, Inc.
Teleprompter of Sheffield Lake, Inc.
Teleprompter of Worcester, Inc.
T.P.T. S.A. de C.V.
Tranco Electronics Pty. Limited
Transformadores de Distribucion Trade, S.A.
Transformadores TPL S.A.
Tyree Electrical Co. Pty. Limited
Tyree Industries Limited

Tyree Industries (N.Z.) Pty. Limited
Tyree Industries (Qld.) Pty. Limited
Tyree Industries (S.A.) Pty. Limited
Tyree Industries (Vic.) Pty. Limited
Tyree-Power Construction Limited
Tyree-Power Construction (Auckland) Limited
Vektron S.A.
Wescan Europe Limited
Westinghouse Asia Controls Corp.
Westinghouse Canada Inc.
Westinghouse Electric-MK Limited
Westinghouse Electric Supply Company of Saudi Arabia
Westinghouse Electro Metalurgicas C.A.
Westinghouse (Jamaica) Ltd.
Westinghouse Proyectos Electricos, S.A.
Westinghouse, S.A.
Westralian Transformers Pty. Limited
Westrans (W.A.) Pty. Ltd.
Wexico Systems and Services, Ltd.
W. T. Engineering Pty. Limited

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Westinghouse Electric Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on February 4, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is published at 669 F.2d 1193, and is attached hereto as Appendix A. The opinion affirmed the decision of the United States District Court for the Eastern District of Missouri, per Judge H. Kenneth Wangelin. The District Court's memorandum and order of May 30, 1980 is reported at 508 F.Supp. 14, and is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on February 4, 1982. A petition for rehearing was filed in the Court of Appeals and was denied on March 4, 1982. This petition for certiorari has been filed within ninety days of the denial of rehearing by the Court of Appeals for the Eighth Circuit. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

This matter involves the Age Discrimination in Employment Act (29 U.S.C. §§621-634), attached hereto as Appendix C.

STATEMENT OF THE CASE

Plaintiff filed an action in the United States District Court for the Eastern District of Missouri, alleging that he was discharged and forced to retire and resign from Westinghouse Electric Corporation's ("Westinghouse") employ, in violation of the Age Discriminatio. :n Employment Act. Plaintiff invoked jurisdiction of the District Court pursuant to 28 U.S.C. §1343 and 29 U.S.C. §621 *et seq.* A jury returned a verdict in favor of plaintiff for $55,710.00 in actual damages, which was reduced by a remittitur of $11,275.00 filed by plaintiff.[1] Upon appeal to the Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §1291, the judgment of the district court was affirmed.

Prior to the events leading up to this lawsuit, plaintiff was employed by Westinghouse in its Business Development Department ("BDD") as a business development representative based in St. Louis, Missouri (Tr. 254). Prior to 1978, the BDD was divided into seven geographical regions and consisted of a total

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[1] The district court denied defendant's motion for a new trial on the condition that plaintiff file the remittitur.

of twenty Westinghouse employees, including regional managers and business development representatives (Tr. 259). The basic duty of a business development representative was to search out planned or potential construction projects within the representative's assigned area which would represent potential customers for the purchase of Westinghouse products, and to make contacts with the construction firms involved (Tr. 102, 309). However, regular salesmen with more technical knowledge, rather than business development representatives, would usually handle the actual sale of Westinghouse products to construction firms (Tr. 102-103).

At trial, Westinghouse produced evidence to show that during 1977, it was determined that the BDD would have to be reorganized and some jobs within the BDD would have to be eliminated, due to an anticipated reduction in the BDD budget for 1978 (Tr. 256-258). To determine which positions would be eliminated, BBD management looked at the potential of each geographical area involved, and determined which areas of responsibility could be overlooked or absorbed by other areas (Tr. 259-260). The total number of professional personnel within the BDD was reduced from twenty to eleven. The original seven regions were reduced to five (nine positions and two regions were eliminated), and offices in four cities, including St. Louis, were entirely closed (Tr. 259, 266).

Plaintiff, then sixty-two years of age, held a position as a business development representative in the Southwest Region, and was the only such representative in St. Louis (Tr. 268). Westinghouse presented uncontroverted evidence which showed that as a consequence of the reorganization of the BDD and the closing of the St. Louis BDD office, the job then held by plaintiff was eliminated (Stipulation p. 1, Tr. 268). At the same time, another business development representative in the Southwest Region, also sixty-two years old, was retained (his job was not eliminated in the reorganization) (Tr. 268). Furthermore, there were two business development representatives other than plain-

tiff, ages 38 and 44, whose jobs were eliminated and who were not transferred to other employment within Westinghouse, but left the company (Tr. 266-267).

Plaintiff testified that at the time his supervisor, K. W. McCall, called to inform Plaintiff (in December, 1977) that the St. Louis office would be closed and plaintiff's job would be eliminated effective January 31, 1978, he and Mr. McCall discussed the possibility of finding another job within Westinghouse for plaintiff, but they *did not* discuss early retirement (Tr. 105-106). Plaintiff admited that when Mr. McCall was in St. Louis several days later, Mr. McCall submitted the necessary forms on plaintiff's behalf to Westinghouse's reassignment department in Pittsburgh, which sometimes assisted in matching available employees with job vacancies within Westinghouse (Tr. 107-108). However, although admitting that other employees of Westinghouse made efforts on his behalf to find him reassignment, plaintiff also testified that the *only* option presented to him at that time was to elect to take early retirement (Tr. 109). Furthermore, plaintiff testified that on the same day, before he knew whether there were any other job openings within Westinghouse for which he was qualified, or whether any such openings would be offered to him, and before he even knew of the nature of the reorganization going on within the BDD which had caused the elimination of his job, plaintiff told Mr. McCall that he intended to sue Westinghouse, and he would see Mr. McCall in court (Tr. 111-113).

Mr. McCall and plaintiff also met with A. C. Davison, the District Administration Manager in Westinghouse's St. Louis office facility, in December, 1977 (Tr. 66). Mr. Davison gave plaintiff a form entitled "Request for Early or Selected Retirement," which plaintiff did not sign at that time (Tr. 66, 315; Plaintiff's Ex. 9). Plaintiff testified that the extent of the conversation was Mr. Davison's statement to plaintiff that "[w]e have a form for you to sign so that you can get your pension"

(Tr. 118). Mr. Davison testified that in this one and only face-to-face meeting with plaintiff, he did not request or tell plaintiff to sign the retirement form, but merely offered plaintiff assistance in determining to what benefits he was entitled, and proferred the early retirement election form which plaintiff could utilize if he desired to elect early retirement; plaintiff presented no evidence to contradict Mr. Davison's testimony (Tr. 315-316).

Since his job was being eliminated for budgetary reasons, plaintiff was presented with the choice of (1) receiving early retirement benefits commencing immediately, although in an amount less than benefits received at normal retirement, or (2) waiting to receive full retirement benefits approximately eighteen (18) months later, meanwhile taking advantage of any available unemployment benefits (Tr. 81-82). Plaintiff later signed the early retirement election form, thus electing to begin receiving reduced pension benefits at age 63, rather than full pension benefits at age 65 (Tr. 82; Plaintiff's Ex. 9). There was no evidence that plaintiff was coerced by Westinghouse into making that decision. To the contrary, plaintiff did not sign the form for several months, and had retained counsel prior to making the election (Defendant's Ex. PP; Plaintiff's Ex. 9).

Plaintiff presented no evidence to indicate his job was eliminated for any reason other than the reorganization of the BDD, nor did he present evidence to show that the reorganization occurred for any reason other than budgetary cutbacks. At trial plaintiff alleged that there were four jobs within Westinghouse which should have been offered to him: territory representative in the Residential and Commercial Air-Conditioning Division ("RCAC") in Kansas City, Missouri; sales representative in the Lamp Division in St. Louis, Missouri; Area Manager in the BDD in southeast Florida; and business development representative in the BDD in Chicago (Tr. 69, 72, 93-94).

Plaintiff testified that his only work experience in the last twelve (12) years prior to the elimination of his job had been

that of a business development representative or the equivalent thereof in St. Louis, Missouri and Memphis, Tennessee (Tr. 52, 105). There was no evidence that plaintiff was *currently* qualified to make sales in any particular technical field. Westinghouse presented extensive testimony as to the superior qualifications of the persons hired or transferred into the four positions in question to explain why it did not offer those jobs to plaintiff (Tr. 156-158, 170-186, 192-193, 207-213, 222-238, 249, 304-307, 330-332, 334-336; Defendant's Ex. J). Plaintiff presented no evidence which would show that the reasons those persons were hired or transferred, in preference to him, were not as stated by Westinghouse. Nor was there any evidence that plaintiff was qualified for any job other than that of a business development representative in the St. Louis area, nor that he was more than qualified than, or even as qualified as, the persons who filled those other jobs.

The evidence showed that plaintiff applied for only two (2) of the four (4) jobs which he claimed should have been offered to him — the job in the RCAC Division and the job in the Lamp Division (Tr. 69, 72, 214). Neither of those jobs which plaintiff applied for was in the BDD, and thus they were not affected by the same budgetary problems facing the BDD. Plaintiff never applied for the two jobs in the Business Development Department which became vacant *after* the reorganization was completed, and those two jobs were filled by intra-company transfers. Westinghouse produced extensive uncontradicted evidence that the Area Manager job in Florida required managerial experience, bilingual capabilities and other qualifications and experience possessed by the person who transferred into the job, but not possessed by plaintiff (Tr. 223-224, 236-237). Plaintiff presented no evidence that those requirements were not valid, or that they were met by plaintiff, or that they were not met by the person transferred into the job. The other job in the BDD was similar to that held by plaintiff, but was located in a different geographical area. Westinghouse

produced uncontradicted evidence that the person transferred into that job was already familiar with the territory and the contacts for the job (Tr. 304-307). Again, plaintiff did not submit any evidence of any knowledge of that geographical area or the contacts needed, nor did he submit any evidence to suggest that those were not valid considerations.

The case went to trial on February 4, 1980, and the jury returned its verdict on February 7, 1980. In his Memorandum and Order following trial, District Judge Wangelin found that there was sufficient evidence to support a verdict for the plaintiff under the ADEA (Appendix B, p. A-12). The Court of Appeals for the Eighth Circuit affirmed the judgment of the District Court, holding that

> [e]vidence was presented from which the jury could infer that the reason for plaintiff's discharge was age . . . . We believe that the jury could reasonably believe that age, as well as the ostensible reorganization, was a determining factor in Westinghouse's decision to eliminate Tribble's position and not hire Tribble into any other available job.

Appendix A, pp. A-6-A-7.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Eighth Circuit Court Of Appeals Raises Important Questions Regarding The Proper Allocation Of Burdens And Order Of Presentation Of Proof Under The Age Discrimination In Employment Act, Which Questions Have Not Been, But Should Be, Settled By This Court.

The resolution of this case in the courts below depended upon the determination of what burdens should be imposed upon the plaintiff and the defendant in a cause of action arising under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§621-634, and the proper monitoring by the court of those burdens when the case is tried to a jury. However, this Court has not yet addressed those issues in the context of a case brought under the ADEA. At the same time, reorganizations and the elimination of jobs, as in the present case, are common in a declining economy, so that it is inevitable that cases will continue to be brought under the ADEA, even when the employer's true motive is economic, rather than discriminatory, in nature. In view of the increasing frequency of such cases in recent years, it is imperative that this Court set out guidelines to be followed by the courts in determining (1) what constitutes proof of a violation of the ADEA (i.e., whether the plaintiff and/or defendant have satisfied their respective burdens), and (2) whether genuine fact issues have been raised in order to submit the case to a jury.

Petitioner recognizes that this Court has considered the issues regarding the allocation of burdens and the order of presentation of proof in the context of discrimination cases brought under Title VII of the Civil Rights Act of 1964, in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), *Board of Trustees of Keene State College v. Sweeney,* 439 U.S. 24 (1979), *Furnco Construction Co. v. Waters,* 438 U.S. 567 (1978) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). Petitioner also recognizes that the principles set out in

the *McDonnell Douglas* line of cases have been applied to age discrimination cases by virtually all of the Courts of Appeals.[2] However, a distinction between Title VII cases and ADEA cases *has* been recognized:

> Because the aging process causes employees constantly to exit the labor market while younger ones enter, simply the replacement of an older employee by a younger worker does not raise the same inference of improper motive that attends replacement of a black by a white person in Title VII cases.

Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 591-592, *rehearing denied*, 582 F.2d 966 (5th Cir. 1978). Petitioner therefore respectfully requests that this Court now conclusively determine the exact standards to be applied in ADEA cases.

Even if this Court concludes that *McDonnell Douglas* and its successors sufficiently set out the guidelines as to the allocation of burdens and the order of presentation of proof in age discrimination as well as Title VII cases, this Court should still grant certiorari for the reasons that (1) the Eighth Circuit has decided this case in a manner which is in conflict with the applicable Title VII decisions of this Court, as cited above; (2) this Court has not set out guidelines to aid the courts below in deter-

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[2] *See Smith v. Farah Manufacturing Co., Inc.*, 650 F.2d 64, 67 (5th Cir. 1981); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 919-920 (2d Cir. 1981); *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1222 (7th Cir. 1980),*cert. denied*, 450 U.S. 965 (1981); *Smithers v. Bailar*, 629 F.2d 892, 894 (3rd Cir. 1980); *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980); *Loeb v. Textron*, 600 F.2d 1003, 1010 (1st Cir. 1979); *Schwager v. Sun Oil Co.*, 591 F.2d 58, 60 (10th Cir. 1979); *Hughes v. Black Hills Power & Light Co.*, 585 F.2d 918, 919 (8th Cir. 1978); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311-312 (6th Cir. 1975).

mining whether genuine fact issues have been raised in discrimination cases so as to require submission of the case to a jury, and the decision of the Eighth Circuit in that regard conflicts with the decisions of other circuits; and (3) the decision of the Eighth Circuit that plaintiff's election of early retirement after his position was eliminated due to adverse economic conditions established a prima facie case of age discrimination is in conflict with decisions of other circuit courts of appeals. These reasons for granting the writ of certiorari are more fully discussed below.

II. In Light Of The Discrimination Cases Previously Decided By This Court, Culminating In *Texas Department Of Community Affairs v. Burdine*, The Eighth Circuit Erred In Holding That There Was Evidence Of Discrimination Where The Employer Produced Evidence Of Legitimate, Nondiscriminatory Reasons For Its Actions, And There Was No Direct Evidence Of Discrimination And No Evidence Of Pretext.

In the case of *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court held that, in a discrimination case where the defendant has produced evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason, the presumption of discrimination raised by a prima facie case is rebutted. *Id.* at 254-255. In order to prevail in such a case, the plaintiff must either present direct evidence that a discriminatory motive more likely than not motivated the employer, or present evidence that the employer's proffered explanation is a pretext. *Id.* at 256. The opinion of the Eighth Circuit in this case is in direct conflict with that rule because it allows plaintiff to recover in a discrimination case where defendant, Westinghouse, presented legitimate, nondiscriminatory reasons for its actions, and plaintiff at no time submitted any direct evidence of discrimination or evidence that the reasons proffered for Westinghouse's actions were pretextual.

Plaintiff alleged that he was discharged and forced to elect early retirement because of his age. Plaintiff, at best, raised a prima facie case of discrimination.[3] Any such prima facie case, however, was rebutted by Westinghouse's explanation for its actions. Westinghouse presented evidence to show that plaintiff's job was eliminated during a departmental reorganization caused by budgetary restrictions, and plaintiff was not offered any of the four jobs he claimed he should have been offered because the persons hired for or transferred into those jobs were more qualified than plaintiff. Such an explanation is sufficient, under the standards set forth in *Burdine*, to rebut the plaintiff's prima facie case. Plaintiff produced no evidence of direct discrimination, such as being told his position was being eliminated because he was too old, or statistical evidence tending to show discrimination. Nor did plaintiff present any evidence to show that the proffered explanation was a pretext - there was no evidence of any other reason for the reorganization, and there was no evidence that plaintiff was qualified for any job other than that of a business development representative in the St. Louis area (the job he had held for the last 12 years), nor that he was more qualified than, or even as qualified as, the persons who filled those other jobs.

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[3] In the Court of Appeals, Westinghouse denied plaintiff even raised a prima facie case of discrimination, since his job was eliminated and he was not replaced, and no evidence was produced to show that plaintiff was qualified for any job other than that of a business development representative. However, Westinghouse assumed, for purposes of argument only, that a prima facie case had been made. The same assumption will be made for purposes of argument here, although Westinghouse still maintains that plaintiff did not raise even a prima facie case of discrimination for the reasons that (1) he was not replaced by a younger person, since his job (and the St. Louis office) was totally eliminated, (2) plaintiff did not produce any evidence that he was qualified for the four jobs he claimed should have been offered to him, and (3) plaintiff did not even apply for the two jobs in the BDD. This issue is discussed in more detail in Section IV below, at pp. 18-23.

The decision of the Eighth Circuit Court of Appeals questions the reality of the reorganization of the department in which plaintiff was employed, although no evidence was presented to show that the reorganization occurred for any reason other than legitimate budgetary considerations. There are numerous decisions by other federal courts of appeals, as well as the Eighth Circuit, which hold that a reorganization due to financial difficulties is a legitimate, nondiscriminatory reason for the elimination of an employee's job.[4] However, contrary to those previous decisions, the Eighth Circuit has now held that such a reorganization was not a legitimate reason, even though there was no evidence to that effect. Furthermore, the Eighth Circuit has ignored the holding of *Burdine* that the *mere statement* of legitimate reasons for the employer's actions is sufficient to rebut any inference raised by a prima facie case. There was no evidence other than the plaintiff's own conclusory allegations to suggest that the reorganization was a pretext, yet the Eighth Circuit questioned the validity of the reorganization. The Eighth Circuit thus imposed the burden of *proof* on Westinghouse with regard to the legitimacy of the reorganization, rather than a mere burden of coming forward, which is a heavier burden than is required under *Burdine*.

The Eighth Circuit has now also imposed a new requirement, not previously required by any federal court of appeals, that an employer find other employment for an employee whose job is eliminated due to budgetary restrictions, regardless of the correlation between that employee's qualifications and any

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[4] *See Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982); *Smith v. Farah Manufacturing Co.*, 650 F.2d 64 (5th Cir. 1981); *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980); *Schwager v. Sun Oil Co.*, 591 F.2d 58 (10th Cir. 1979); *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958 (8th Cir. 1978); *Marshall v. Roberts Dairy Co.*, 572 F.2d 1271 (8th Cir. 1978); *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977).

available jobs, and regardless of the superior qualifications of other new or existing employees. The precedent of the Court of Appeals in this case will now expose employers to liability for discrimination for not offering a job to a person protected by the ADEA even when that person didn't apply for that job.[5] The Eighth Circuit has thus placed the burden on the employer to treat persons protected by the Age Discrimination in Employment Act more favorably than those who are not so protected. That is not the stated purpose of the ADEA (*see Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 960 (8th Cir. 1978); *see also Texas Department of Community Affairs v. Burdine*, 450 U.S. at 259).

The Eighth Circuit discredited Westinghouse's financial difficulties because other persons were allegedly hired at the same time that plaintiff's job was eliminated. However, two of the four jobs involved were in divisions other than the Business Development Department, and no claim was made that those divisions were having budgetary problems. Furthermore, plaintiff submitted no evidence that he was qualified for either of those two jobs. There was thus no evidence to show any pretext in Westinghouse's detailed explanation that the persons hired for those jobs were more qualified than plaintiff.

At best, plaintiff raised an inference of discrimination by purportedly establishing a prima facie case. However, under *Burdine*, any such inference was rebutted by Westinghouse's explanation of its legitimate, nondiscriminatory reasons for its ac-

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[5] The Eighth Circuit ignored the fact that plaintiff never applied for either of the BDD jobs in question. See Appendix A, pp. A-3,A-5.

tions.[6] The Eighth Circuit ignored the allocation of burdens as set out in *Burdine,* and concluded that

> *[e]vidence was presented from which the jury could infer* that the reason for plaintiff's discharge was age . . . . We believe that the jury could reasonably believe that age, as well as the ostensible reorganization, was a determining factor in Westinghouse's decision to eliminate Tribble's position and not hire Tribble into any other available job.

Appendix A, pp. A-6-A-7. (emphasis added).

The Court of Appeals did not note or rely upon any evidence of pretext or direct evidence of discrimination, because no such evidence was presented. The Eighth Circuit disregarded that in the absence of such evidence, there was no evidence on which to base a finding of discrimination. Since, under the guidelines of *Burdine,* Westinghouse fully rebutted any prima facie case presented by plaintiff, and there was no other evidence of discrimination, in finding that there was evidence "from which the jury could infer that the reason for plaintiff's discharge was age," the Eighth Circuit has decided a federal question in a way which is in conflict with prior applicable decisions of this Court.

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[6] The facts in the present case are similar to the facts in *Sutton v. Atlantic Richfield Co.,* 646 F.2d 407 (9th Cir. 1981). The Court there adopted the *McDonnel Douglas* allocation of burdens, as explained in *Burdine,* and found that any prima facie case was rebutted by the employer's explanation, that the plaintiff really did have a choice as to whether he should elect early retirement, and, since the prima facie case had been rebutted, the plaintiff's lawsuit was properly dismissed. *Id.* at 411-412.

III. The Decision Of The Eighth Circuit Court Of Appeals Is In Conflict With The Decisions Of Other Courts Of Appeals With Respect To The Determination Of Whether A Plaintiff Makes Out A Submissible Jury Case Of Discrimination Where The Defendant Presents Evidence Of Legitimate, Non-discriminatory Reasons For Its Actions, And Guidelines For That Determination Have Not Been, But Should Be, Defined By This Court.

Federal courts of appeals other than the Eighth Circuit, recognizing the order of presentation of proof as most recently clarified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254-256 (1981), have held that if there is no direct evidence of discrimination and no evidence of pretext, and the employer states legitimate, nondiscriminatory reasons for its actions, no genuine issue of fact exists to be decided by the jury in a discrimination case. In *Smith v. Flax*, 618 F.2d 1062 (4th Cir. 1980), the Fourth Circuit Court of Appeals upheld the District Court's entry of judgment for the employer, notwithstandng the jury's verdict for the employee, because the employer had rebutted any prima facie case established by the plaintiff employee with the explanation that the plaintiff's job was eliminated, the plaintiff was not qualified for other available jobs with the employer, and there was no evidence to the contrary. The plaintiff in *Smith v. Flax* did claim that he was qualified for other jobs with the employer, but the court noted that "[p]laintiff's perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant." *Id.* at 1067. The relevant facts in *Smith v. Flax* are virtually identical to the facts in the present case, yet the holding of the Eighth Circuit in the present case is in direct conflict with that of the Fourth Circuit.

The Fifth, Sixth and Seventh Circuits have also recognized the significance of the employer's explanation of its actions going uncontradicted by direct evidence or evidence of pretext. In *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369 (5th

Cir. 1980), as in the present case, there was no evidence presented to contradict the employer's explanation for its actions. The Fifth Circuit affirmed summary judgment in favor of the employer, noting that "[t]he possibility of a jury drawing a contrary inference sufficient to create a dispute as to a material fact does not reify to the point even of a thin vapor capable of being seen or realized by a reasonable jury." *Id.* at 371.

Similarly, in *Kephart v. Institute of Gas Technology*, 630 F.2d 1217 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), the Seventh Circuit held that summary judgment in a case tried to the court (the equivalent of a directed verdict in a case tried to a jury) was proper where the employer had articulated legitimate, nondiscriminatory reasons for its actions, and the plaintiff introduced no evidence of discriminatory motive or intent. *Id.* at 1218. The Sixth Circuit has recently come to the same conclusion in *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982), granting summary judgment in favor of the employer where there was no evidence in the record to support a finding of discrimination other than plaintiff's own conclusory allegations. *Id.* at 69, 71.

The decision of the Eighth Circuit is thus in direct conflict with the decisions of the Fourth, Fifth, Sixth and Seventh Circuits. Those circuit courts of appeals held that where the prima facie case is rebutted by the employer's statement of legitimate reasons for its actions, there are no issues of fact to be considered unless the plaintiff has produced some evidence of pretext or direct evidence of discrimination. The inference of discrimination raised by the prima facie case is dispelled by the employer's explanation. *See Smith v. Flax, supra.* as noted by the Fifth Circuit Court of Appeals, "[a] mere scintilla of evidence is insufficient to present a question for the jury . . . . There must be a conflict in substantial evidence to create a jury question." *McCorstin v. United States Steel Corp.*, 621 F.2d 749, 752 (5th Cir. 1980). The Eighth Circuit, however, has now held to the contrary, holding that, regardless of the evidence,

once a prima facie case of discrimination is established, the case should be submitted to the jury. Appendix A, p. A-6.

Instead of following the three-stage burden analysis of *Burdine* and its predecessors, as was done by the Fourth, Fifth, Sixth and Seventh Circuits, the Eighth Circuit construed *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, ____ U.S. ____, 101 S.Ct. 316 (1981), to stand for the proposition that once a plaintiff makes a prima facie case, *regardless of what other evidence, if any, exists,* the issue of discrimination is to be presented to the jury. Appendix A, pp. A-5-A-6. However, the Eighth Circuit failed to recognize that *Spagnuolo is* consistent with the cases cited above in that it requires direct evidence of discrimination, rather than mere inferences from a prima facie case, in order to take the case to a jury, after the employer has articulated legitimate, non-discriminatory reasons for its actions. As this Court recognized in *Burdine,* direct evidence or evidence of pretext is required because the inferences raised by a prima facie case are dispelled by the employer's articulation of legitimate reasons for its actions. 450 U.S. at 256. The Eighth Circuit thus construed *Spagnuolo* incorrectly, and, in the process, disregarded this Court's holding in *Burdine.*

The Eighth Circuit's analysis ignored that in the absence of direct evidence of discrimination or evidence of pretext, there was no issue of fact to be submitted to the jury, and instead improperly concluded that there were fact issues raised to be submitted to the jury. The Fourth, Fifth, Sixth and Seventh Circuit Courts of Appeals have recognized that, in such a situation, no fact issues remain. In order to make any finding of discrimination where the prima facie case has been rebutted and no direct evidence of discrimination or evidence of pretext exists, the jury would be required to guess or conjecture at Westinghouse's motives. It is to prevent such speculation that the order of presentation of proof in discrimination cases, as most recently clarified in *Burdine,* was created. *See Sahadi v. Reynolds Chemical,* 636 F.2d 1116, 1117 (6th Cir. 1980).

Petitioner respectfully requests that this Court now clarify the standards to be applied in ADEA cases to determine whether a conflict in the evidence, sufficient to create fact issues to be presented to a jury, really exists. The Fourth, Fifth, Sixth and Seventh Circuits have already made the determination that no such conflict exists where there is no evidence to contradict the employer's explanation for its actions, but the Eighth Circuit has now held to the contrary. It is submitted that certiorari therefore should be granted in order to eliminate conflicting results in the circuit courts of appeals.

IV. The Eighth Circuit Court Of Appeals Erred In Holding That A Sixty-Three-Year-Old Employee Who Elected Early Retirement After His Position Was Eliminated Due To Adverse Economic Conditions Established A Prima Facie Case Of Age Discrimination, And Its Decision Conflicts With Those Of Other Circuit Courts Of Appeals.

The Eighth Circuit Court of Appeals found that plaintiff was discriminated against because his job was eliminated, and Westinghouse failed to hire plaintiff into any other job within the company. However, under the guidelines previously set down by this Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), plaintiff did not even make out a prima facie case of age discrimination.

This Court has outlined the prima facie case for discrimination based on a theory of failure to hire in the Title VII area to require that the plaintiff show

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. Plaintiff failed to establish a prima facie case of discriminatory failure to hire because (1) he did not produce any evidence that he was qualified for the four jobs he claimed should have been offered to him, and (2) he did not even apply for the two jobs in the BDD.[7]

Plaintiff also did not make out a prima facie case of discriminatory discharge. The Eighth Circuit has previously held that a plaintiff's prima facie case of age discrimination based on a theory of discharge is made by showing that (1) he is within the protected age group, (2) he met applicable job qualifications, (3) despite these qualifications he was discharged, and (4) after the discharge the position remained open and the employer continued to seek applications from persons with similar qualifications.[8] *Cova v. Coca-Cola Bottling Co.*, 574 F.2d 958, 959 (8th Cir. 1978). The plaintiff in the present case did not make out a prima facie case of discriminatory discharge because his job did not remain open and he was not replaced by a younger person, since his job (and the St. Louis office of the BDD) was totally eliminated.

Circuit courts of appeals other than the Eighth Circuit have held, under similar circumstances, that no prima facie case of age discrimination based on a theory of discharge was made.

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[7] Plaintiff did not show he was qualified for any job other than the job of a business development representative. Although he may have been minimally qualified for the job of business development representative in Chicago, plaintiff failed to establish a prima facie case with respect to that job because he did not apply for it. There was also no evidence that applicants with plaintiff's qualifications were sought for that job (or for any of the other three jobs).

[8] This final element is often construed as a requirement that the plaintiff show he was *replaced* after his discharge. *See Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 920 (2d Cir. 1981).

The Second Circuit Court of Appeals came to that conclusion in *Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914 (2d Cir. 1981), which involved facts similar to those in the present case: the plaintiff's job was eliminated, and he was given the alternative of early retirement. The Second Circuit, however, found that the plaintiff had not established a prima facie case because he was not replaced, his position was not kept open, and there was no evidence that a new employee took over the plaintiff's work. *Id.* at 920. Although a jury in the district court had made a large award of damages to the plaintiff, the Second Circuit Court of Appeals reversed and remanded, recognizing that "the defendant's motion for a directed verdict should have been granted." *Id.* at 924. The Eighth Circuit's decision here, however, is directly in conflict with that of the Second Circuit in *Stanojev*, since the Eighth Circuit held that a prima facie case was established, even though the plaintiff's job was eliminated, his position was not kept open, and there was no evidence that a new employee took over the plaintiff's work.

Under similar circumstances, the Sixth Circuit has also held that no prima facie case was made by the plaintiff. In *Sahadi v. Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980), the plaintiff's job was eliminated due to a reduction in the work force caused by economic factors. The plaintiff was not replaced. The district court did not submit the case to a jury, but directed a verdict for the employer. The Court of Appeals affirmed, finding that no prima facie case had been made. *Id.* at 1118-1119.

In *Price v. Maryland Casualty Co.*, 561 F.2d 609 (5th Cir. 1977), the employer had determined that one of three substantially similar jobs in a particular office would have to be eliminated for economic reasons. The plaintiff, whose job was chosen to be eliminated, was the oldest of the three employees. However, the Fifth Circuit found that since the plaintiff's job was eliminated and he was not replaced, no prima facie case had been made, even though the plaintiff's duties were taken over by the younger employees. The facts in *Price* are substantially similar to the facts

in the present case, but the Eighth Circuit's holding is directly contrary to the Fifth Circuit's holding.

The Eighth Circuit failed to recognize that, while a position in one part of a company may be eliminated due to economic pressures, another position in another department or division may become vacant and be filled by someone other than the employee whose position was eliminated. This Court recognized in *Burdine* that "[t]he employer has discretion to choose among equally qualified candidates." 450 U.S. at 259. Particularly where the two positions are not identical, there well may be persons who are *more* qualified for the open position than the person whose job was eliminated, and who are hired for that reason, without any consideration given to the employee's age. The fact that the more qualified person is younger than the employee whose position was eliminated should not automatically mean that an employer may not hire that more qualified, but younger, person. However, the Eighth Circuit's holding that plaintiff's evidence established a prima facie case would have exactly that effect, if it is allowed to stand. Plaintiff's job was eliminated, and he was not replaced. Vacant positions different from that held by plaintiff were filled by persons best qualified for those jobs.

The holding of the Eighth Circuit is also in conflict with the decision of the Sixth Circuit Court of Appeals in *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66 (6th Cir. 1982). In *Ackerman*, as in the present case, the plaintiff was informed that his job was being eliminated, and later signed an agreement to elect the benefits of early retirement. The plaintiff then asserted that he was given no alternative to taking early retirement, so that he really was discharged. The Sixth Circuit, however, noted that the plaintiff had produced no evidence other than his own "conclusory allegations" to show that he did not voluntarily elect early retirement. It was therefore determined that the plaintiff had failed to state a prima facie case because he did not show that he was discharged, and summary judgment

in favor of the defendant employer was affirmed. The Sixth Circuit thus held that giving an employee the choice between early retirement and termination does not constitute an element of a prima facie case under the ADEA.

The case now under consideration involves an employee who, upon being informed that his job was being eliminated, had the choice of (1) receiving early retirement benefits commencing immediately, although in an amount less than benefits received at normal retirement, or (2) waiting to receive full retirement benefits approximately eighteen (18) months later, meanwhile taking advantage of any available unemployment benefits. The choice made by the plaintiff herein to receive early retirement benefits was not made by Westinghouse, but was made by plaintiff. *See Stanojev v. Ebasco Services, Inc.*, 643 F.2d 914, 922 (2d Cir. 1981). However, contrary to the Sixth Circuit, the Eighth Circuit found that one element of a prima facie case of age discrimination was that "Westinghouse confronted plaintiff with the alternative of early retirement or termination." Appendix A, p. A-5.

The issue concerning an employee's election to take early retirement, in preference to being laid off or terminated, is an important one which should be considered by this Court. Guidelines need to be established to determine when action taken with respect to an employee who is eligible for early retirement can be characterized as being motivated by that employee's age. The termination of an employee who happens to be eligible for early retirement should not automatically be considered to have been done because of that employee's age - yet, without standards to apply, a jury may believe that the act of offering an employee early retirement is a violation of the ADEA, since such an act is obviously based, in part, on the employee's age (a younger employee would not have the option of early retirement). The Sixth Circuit has held that the termination of an employee for legitimate, nondiscriminatory reasons is not a violation of the ADEA, even if that employee elects early

retirement in preference to outright termination. *Ackerman v. Diamond Shamrock Corp., supra.* If the contrary decision of the Eighth Circuit here is allowed to stand, however, the result may very well be that employers, in order to avoid liability under the ADEA, would eliminate their early retirement programs altogether. An older employee could then be terminated on the same basis as any younger employee, without any possible implication being raised by the fact that the older employee was eligible to elect early retirement.

It is thus necessary for this Court to determine whether early retirement is a benefit, as long as age is not improperly considered, (as was determined in *Ackerman v. Diamond Shamrock Corp.*), or whether, regardless of the circumstances, it is to be considered a mere subterfuge, as has now been decided by the Eighth Circuit. In connection therewith, petitioner respectfully requests that this Court now conclusively determine the exact elements which constitute a prima facie case of discrimination under the ADEA, and to resolve the conflict between the Eighth Circuit and the Second, Fifth and Sixth Circuits.

CONCLUSION

If the decision of the Eighth Circuit Court of Appeals is allowed to stand, employers will be constrained to retain employees whose jobs would otherwise validly be eliminated for budgetary reasons, or to place such employees in positions for which they are not qualified or for which better qualified persons are available. The attainment of age forty will, in effect, insulate an employee against losing his job, despite the current state of the economy and the fact that people of all ages are losing their jobs due to budgetary cutbacks. Furthermore, early retirement programs will be jeopardized, since the mere election of early retirement by an employee, although chosen by the employee, may subject the employer to liability under the Age Discrimination in Employment Act.

Based on the foregoing reasons and authorities, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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